

52
No. 108, Original

In The
Supreme Court of the United States
October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

**EXCEPTIONS OF THE STATE OF WYOMING
TO THE THIRD INTERIM REPORT OF THE
SPECIAL MASTER AND BRIEF IN SUPPORT**

JOSEPH B. MEYER
Attorney General of Wyoming

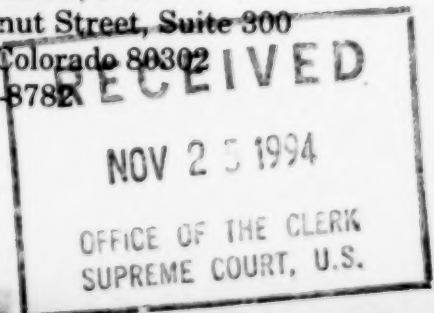
LARRY DONOVAN
Senior Assistant
Attorney General
Counsel of Record

DONALD M. GERSTEIN
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Special Assistant
Attorney General
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant
Attorneys General
MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

November 25, 1994



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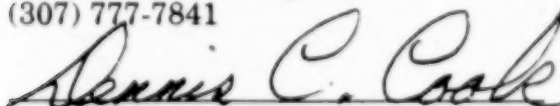
2. The State of Wyoming takes exception to the Special Master's recommendation to entertain Nebraska's claims of injury to non-irrigation season uses and uses downstream of the apportioned reach of the North Platte River, including endangered species and wildlife habitat uses.

3. The State of Wyoming takes exception to the Special Master's recommendation to entertain Nebraska's Horse Creek claim which would expand the scope of the North Platte River apportionment.

4. The State of Wyoming takes exception to the Special Master's recommendation to entertain Nebraska's claims to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK

Special Assistant Attorney General
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE STATE OF WYOMING



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**WYOMING BRIEF IN SUPPORT OF
EXCEPTIONS TO THE THIRD INTERIM
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I. QUESTIONS PRESENTED

This matter is before the Court on exceptions to the Special Master's Third Interim Report on Motions to Amend the Pleadings. Wyoming's exceptions raise the following issues:

1. Whether the Court should grant Wyoming leave to file its First Counterclaim and First Cross-Claim which seek injunctive relief to prevent circumvention of the equitable apportionment of the North Platte River through unlawful and wasteful practices.

2. Whether the Court should deny Nebraska leave in Counts I and III to claim injury to non-irrigation season uses and uses downstream of the apportioned reach of the North Platte River, including endangered species and wildlife habitat uses.

3. Whether the Court should deny Nebraska leave in Count I to claim an apportionment of return flows below Tri-State Dam without a threshold showing of serious injury.

4. Whether the Court should dismiss on the pleadings Nebraska's claim to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use.

II. JURISDICTION

The Court has previously granted leave to both Nebraska and Wyoming to file claims in the retained jurisdiction of the Court pursuant to Paragraph XIII of

the 1945 Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945). *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) and 481 U.S. 1011 (1987). The Court's jurisdiction rests on Article III, Section 2, Clause 2 of the U.S. Constitution and the Judiciary Act, 28 U.S.C. §1251(a) (1988). This case is now before the Court on motions for leave to file amended pleadings submitted by Nebraska and by Wyoming.

III. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

The Third Interim Report of the Special Master now before the Court addresses Nebraska's third and Wyoming's first requests to amend their pleadings to assert new claims or to clarify existing claims.

Nebraska's original petition, accepted for filing in 1987, requested "that the Court enter its order requiring the State of Wyoming to comply with the . . . Decree . . . and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree." Petition for an Order Enforcing Decree and for Injunctive Relief at 3-4 (Docket No. 1)¹. Wyoming's counterclaim, also accepted for filing in 1987, alleged that Nebraska has "circumvented and violated the Decree . . . [b]y demanding natural flow water . . . in excess of the present beneficial use requirements of the Nebraska lands entitled to water . . . under the Decree"

1. Docket numbers refer to the docket maintained by the office of the Special Master.

and "[b]y demanding natural flow and storage water . . . and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree." Wyoming Counterclaim at 8-9 (Docket No. 5). Wyoming's counterclaim sought injunctive relief to prevent Nebraska's circumvention of the Decree. *Id.*

Wyoming's counterclaim was based on the Court's holding that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen [in Wyoming] for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628. Affidavits in the record support the allegations in Wyoming's counterclaim that Nebraska has been diverting excessive amounts of water into canals in the apportioned Guernsey to Tri-State section of the river and wasting that water back to the river for use below Tri-State Dam. Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 42-48; Third Affidavit of Bern S. Hinkley; Affidavit of Earl Michael (Docket No. 352). See Map in Appendix. The affidavits show that the excessive diversions by Nebraska canals result from using substantially inflated irrigated acreage figures to calculate allowable diversions, failing to require adequate measuring devices, demanding delivery of storage water below Tri-State Dam and failing to divert and use such deliveries, returning excessive amounts of water unused through wasteways and applying unreasonably large and unsubstantiated transportation losses to storage deliveries. *Id.* Wyoming asserted that Nebraska, through wasteful and inefficient practices, was accomplishing indirectly that which the Court said Nebraska was not entitled to do directly: the bypassing of water to uses downstream of Tri-State Dam in circumvention of the apportionment.

In January, 1988, Nebraska requested leave to file an amended petition that would have sought a new or expanded equitable apportionment of the North Platte River to provide water for instream endangered species and wildlife habitat uses in the central Platte River in Nebraska ("1988 amended petition"). The Court denied leave to file the 1988 amended petition. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). In October, 1991, Nebraska sought leave to file an amended petition while cross-motions for summary judgment on the 1986 petition were pending before the Special Master ("1991 amended petition"). Count I of the 1991 amended petition would have sought an equitable apportionment of non-irrigation season flows of the North Platte River for uses below Tri-State Dam in Nebraska, including the same instream wildlife habitat uses that Nebraska had unsuccessfully sought to bring into the case with its 1988 amended petition. Counts II and III of the 1991 amended petition would have asserted new claims of injury to or violation of the existing apportionment against Wyoming and against the United States. After deciding the summary judgment motions in the 1993 opinion, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Court denied Nebraska leave to file Count I of its 1991 Amended Petition and referred Counts II and III to the Special Master for recommendation. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993).

The Court's 1993 opinion concluded, *inter alia*, that new water development on the North Platte tributaries in Wyoming did not violate the present Decree. Similarly the Court concluded that the Decree does not "impose a cap" on the diversions by Nebraska canals diverting from the pivotal reach. *Nebraska v. Wyoming*,

113 S.Ct. at 1701.² However, obviously referring to both Nebraska's claims and Wyoming's counterclaim, the Court noted that it had retained jurisdiction under Paragraph XIII of the Decree to "modify the decree in light of substantial changes in supply, threatened future development, or circumvention of the decree." *Id.* at 1693-94. Consequently, the Court held that the parties could seek modification of the Decree under the existing pleadings. However, new injunctions that would add restrictions on a state's use would be available only upon a showing of substantial injury by clear and convincing evidence. *Id.* at 1694-96.³ In so holding that additional injunctive relief might be available in this case, the Court did not open the case to claims for a new Nebraska apportionment or to expand the geographic limits of Nebraska's existing apportionment because such claims were not before the Court in the original pleadings.⁴

2. The Court noted that the parties had not "sought summary judgment on Wyoming's counterclaim" and that the other "more limited rulings" that the parties had sought in relation to the counterclaim were "too theoretical and not sufficiently anchored . . . to be susceptible of summary resolution . . ." *Nebraska v. Wyoming*, 113 S.Ct. at 1700.

3. The Court also held that in an action to enforce previously determined rights, the plaintiff need not show injury. *Nebraska v. Wyoming*, 113 S.Ct. at 1695.

4. Nebraska has continually characterized the claims in the 1986 petition as seeking to protect the apportionment determined in the prior proceedings. Most recently Nebraska said:

Nebraska's original Petition sought to address various violations of the Decree by Wyoming. Nebraska alleged that Wyoming was violating the Decree and threatening to upset Nebraska's equitable apportionment established by the Court . . .

Nebraska's Brief in Support of Motion for Leave to File Amended Petition, February 18, 1994 at 3 (Docket No. 623).

The present motions for leave to amend were filed in early 1994. The Court referred them to the Special Master. *Nebraska v. Wyoming*, 114 S.Ct. 1290 (1994). After receiving briefs the Special Master issued his Fourteenth Memorandum stating his "tentative recommendations" and presenting a number of questions to the parties. (Docket No. 677.) (Copy reproduced in Appendix at A-1.) The Special Master held argument on the motions to amend on July 26 and 27, 1994 (Transcript of hearing found at Docket No. 688) and, after inviting and receiving supplemental authority on equitable apportionment methods,⁵ filed his Third Interim Report.

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5. At argument, the Special Master invited the citation of supplemental authority on the following question:

Is there, in the history of . . . the equitable apportionment doctrine . . . any circumstance where a downstream state has, in effect, received a mass allocation which had the consequence of allowing the upstream state to only honor the mass allocation but to otherwise deplete the stream?

The question included interstate compacts. Transcript of July 26-27, 1994 hearing at 252 (Docket No. 688). In response Wyoming cited numerous interstate compacts that had precisely that effect. In addition, Wyoming pointed out that the Court has issued only three interstate equitable apportionment decrees. One allocated a fixed quantity to the upstream state, leaving the rest to be used by the downstream state. *Wyoming v. Colorado*, 259 U.S. 419 (1922), decree modified 260 U.S. 1 (1922). Another provided for a fixed delivery obligation to the downstream state, while also placing an upper limit on the upstream state's diversions. *New Jersey v. New York*, 283 U.S. 336 (1931), decree modified, 345 U.S. 369 (1953). The third is the North Platte apportionment at issue in this case. Letter from Dennis Cook to the Honorable Owen Olpin, August 4, 1994 (Docket No. 689); Order of the Special Master, August 5, 1994 (Docket No. 691).

B. NATURE OF THE AMENDED PLEADINGS

The amended petition that Nebraska now tenders would replace the remaining Counts II and III of its 1991 amended petition. Some of the claims that Nebraska tenders would expand the scope of this case from one to protect the existing apportionment by enforcement and modification of the Decree to one for a new apportionment. Count I would attempt to clarify and restate the allegations in Nebraska's 1986 petition, but also would add new allegations that Wyoming is violating Nebraska's apportionment by failing to maintain adequate records under the Decree, by allowing ground water development, by improving the efficiency of existing projects and by interfering with return flows through Horse Creek, a tributary to the North Platte downstream of Tri-State Dam. Count II would assert that the United States is violating Paragraph XVII of the Decree by entering into contracts to provide storage water or storage space in Glendo Reservoir for uses not authorized in the Decree. Count III would recast Nebraska's Laramie River claim as one for a new apportionment for year-around uses and for uses downstream of Tri-State Dam. Count IV of the newly tendered petition is a renewal of Count I of Nebraska's 1991 petition for a non-irrigation season apportionment, which the Court denied leave to file in 1993. Nebraska's Brief in Support of Motion for Leave to File Amended Petition at 3 (Docket No. 623).

The amendments tendered by Wyoming would clarify and amend Wyoming's existing counterclaim and would assert several new claims against Nebraska and the United States. Wyoming's amended First Counterclaim against Nebraska and First Cross-Claim

against the United States allege essentially the same facts as Wyoming's original counterclaim. The amended First Counterclaim is more specific than Wyoming's original counterclaim in describing both the actions by which Nebraska has circumvented the apportionment and the additional injunctive relief sought by Wyoming to give full effect to the existing apportionment. It would ask the Court to modify the Decree to enjoin unlawful and wasteful diversions if the Court finds that Nebraska is circumventing or undermining the apportionment by such diversions. Wyoming's First Cross-Claim would bring similar allegations against the United States. The First Cross-Claim alleges that the United States has contributed to the unlawful and wasteful use of water in the pivotal reach by the manner in which it has operated the federal reclamation projects.

Wyoming's Second Counterclaim would amend the present counterclaim concerning Nebraska's use of Glendo Reservoir storage water by withdrawing the allegation that Nebraska has used that water outside the basin of the North Platte River and by identifying the specific water service contract which Wyoming alleges to violate the Decree. The Second Cross-Claim would bring those same allegations against the United States as a party to that water service contract.

Wyoming's Third Counterclaim and Third Cross-Claim would introduce a claim for relaxation of the Decree's limits on the use of Glendo Reservoir storage water as an alternative to the claim for relief asserted in the Second Counterclaim and Second Cross-Claim. Wyoming's Fourth Counterclaim and Fifth Cross-Claim would seek a modification of the Decree to remove pro-

visions for calculation of carriage loss on the delivery of storage water which Wyoming asserts are no longer correct and, as a result, do not serve their intended purpose.

Finally, Wyoming's Fourth Cross-Claim alleges that the United States has violated various contracts for the delivery of storage water and applicable federal law, thereby undermining the apportionment of natural flow. Wyoming alleges that the Court relied heavily on the presence of storage water in the system and assumed its lawful distribution in accordance with existing contracts when determining the equitable apportionment of natural flow⁶ and that the United States has upset the apportionment by the manner in which it has allocated water released from the federal reservoirs.

IV. SUMMARY OF ARGUMENT

This case turns on the equitable apportionment of the North Platte River determined in the Court's 1945 opinion. The Court, through a series of decisions since 1986, has agreed to hear Nebraska's and Wyoming's claims to enforce the existing equitable apportionment of the North Platte and, if necessary, to modify the North Platte Decree to give effect to that apportionment. The Court twice has denied Nebraska's attempts to expand the scope of this case to determine whether North Platte flows are required for uses below the presently apportioned reach, including endangered species and wildlife

6. Nebraska agrees that the equitable apportionment was premised on the recognition that federal reservoirs provide storage water to the same lands for which natural flows are apportioned. Nebraska's tendered Amended Petition at 3, ¶7 (Docket No. 623). See also *Nebraska v. Wyoming*, 325 U.S. at 605.

habitat in central Nebraska and whether such determination would warrant a new apportionment. When read together, the Court's opinion and orders in this case frame the case as one to protect and to give effect to the existing apportionment.

The Court should continue to limit this case to one which would more clearly define the existing apportionment. Upon resolution of this case, if a party can show that the apportionment is no longer equitable or that changed conditions threaten irreparable injury to a state's interest even under the existing apportionment, the Court could consider a future application to adjudicate a new apportionment. However, such a future claim for a new apportionment would have to overcome the important principles of finality and certainty that lie at the root of the Court's reluctance to reopen an equitable apportionment.

The claims related to the Laramie River provide an example of the present dispute over the scope of this case. If this case is about protecting the existing apportionment, then Nebraska must prove that Wyoming's use of waters of the Laramie River so substantially reduces the flows in the apportioned reach as to cause real and substantial injury to uses that form the basis of Nebraska's apportionment - the canals diverting in the apportioned reach from Guernsey to Tri-State Dam. If, on the other hand, the Court directs the Special Master to try the issue of whether Wyoming's use of the Laramie River injures Nebraska's uses below Tri-State Dam, then this case in effect would be transformed into an action for a new North Platte apportionment in the first instance for such downstream uses. In that event the Court would face a greatly expanded, complex, and expensive litigation.

With respect to claims to modify the Decree to give effect to the existing apportionment, the Special Master would have the Court apply different standards to the similar claims of Nebraska and Wyoming. On the one hand, the Special Master recommends denial with prejudice of Wyoming's counterclaims and cross-claims that would seek additional injunctions in the Decree because, in his view, those claims would relitigate the basic apportionment. On the other hand, he recommends that the Court accept Nebraska's similar claims for new injunctions against Wyoming's development of Deer Creek and the Laramie River. He fails to appreciate that the claim for additional injunctions in the Decree that Wyoming would bring is a matter which the Court expressly reserved for consideration at the foot of the Decree. Because the Court expressly retained jurisdiction over the issue of whether limits on Nebraska's diversions may become necessary in order to carry out the apportionment, the Master surely is in error in suggesting that the issue has been foreclosed as a matter of res judicata.

With respect to Nebraska's claim in Count IV for a new apportionment, the Special Master recommends that the Court deny for the third time Nebraska's attempt to transform this case into a "global apportionment" for non-irrigation season uses or uses below Tri-State Dam. The Special Master recognizes again that wildlife habitat needs have not been determined and that, as a result, claims for an apportionment for that purpose are premature. Nonetheless he insists that he inevitably will be called upon to address endangered species and wildlife habitat needs in this case. Therefore rather than wait until Nebraska can articulate a case for a new apportionment he has announced

that he will now hear evidence of the impact of Wyoming's existing and proposed uses on alleged water needs for endangered species and wildlife habitat downstream in the Platte River in central Nebraska. By doing so he would transform this case into one for a new apportionment for such downstream uses. Unless the Court directs the Special Master on this point and reaffirms that this case is limited to claims to carry out the equitable apportionment, the Court's previous denials of Nebraska's motions to amend will be rendered meaningless and the Special Master will admit Nebraska's claims for a new and expanded apportionment through the back door.

Similarly Wyoming believes that the Special Master's recommendation to accept Nebraska's claim to enjoin proposed efficiency measures in the Horse Creek basin would improperly entertain a claim to expand the scope of the apportionment. Nebraska has not alleged sufficient injury to justify the extraordinary step of reopening the apportionment.

Finally Nebraska's claim for restriction of ground water use in Wyoming should be dismissed on the pleadings. The Court should not in equity hear Nebraska's request to impose interstate regulation of wells when Nebraska refuses to impose such regulation as a matter of intrastate law.

V. ARGUMENT

A. THE PURPOSE OF THIS CASE IS TO DEFINE AND PROTECT THE EXISTING APPORTIONMENT, NOT TO ADJUDICATE A NEW APPORTIONMENT OR ENLARGE THE GEOGRAPHIC LIMIT OF THE APPORTIONMENT.

The Court's 1945 opinion fashioned an apportionment to prevent threatened injury to the specific irrigation uses which Nebraska was able to show were in need of protection, i.e., the canals diverting in the pivotal Guernsey to Tri-State section of the North Platte River. *Nebraska v. Wyoming*, 325 U.S. at 628. As to uses below Tri-State Dam, the Court adopted Special Master Doherty's finding that local sources and return flows were sufficient and that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Id.* at 628, 654-55; Doherty Report at 96. Special Master Olpin acknowledges the "geographic limits of Nebraska's apportionment." Third Interim Report at 43.

After determining the basic apportionment in the 1945 opinion, the Court directed the parties to draft a decree containing the injunctions deemed necessary by the Court to put the apportionment into effect. *Nebraska v. Wyoming*, 325 U.S. at 657, 665. As the Court recognized in its 1993 opinion, the Decree is not synonymous with the apportionment.⁷ Rather, the

7. For example, the Court found that Nebraska's apportionment determined in the earlier proceeding included the right to store water in the Inland Lakes despite the Decree's silence on the subject. *Nebraska v. Wyoming*, 113 S.Ct. at 1697. The Court held that

Decree is a means for carrying out the apportionment. See Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 8-12 (Docket No. 624).

The motions for leave to amend the pleadings frame a fundamental dispute about the scope of this case: whether the Court has accepted or should accept claims for a new or expanded apportionment or whether the Court should continue to limit any claims for modification of the Decree to those for the purpose of carrying out and giving effect to the existing equitable apportionment. The issue flows in part from Wyoming's effort in the opening brief on its motion to amend to reconcile certain statements in the Court's 1993 opinion with the fact that the Court has twice denied Nebraska leave to bring claims for a new or expanded apportionment. The 1993 opinion held that the parties might seek modification of the Decree and that consideration of new injunctions in the Decree "may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." However, by denying Nebraska's previous motions to amend, the Court has stopped short of opening this case to a complete reweighing of the equities. *Nebraska v. Wyoming*, 113 S.Ct. at 1695. Wyoming reasoned in its opening brief:

The only interpretation that gives effect to both the April 20, 1993 opinion and the Court's orders denying Nebraska leave to amend is one that dis-

"when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue." *Id.* at 1695, citing *Wyoming v. Colorado*, 286 U.S. 494, 506-08 (1932).

tinguishes between modification of the Decree and modification of the underlying equitable apportionment. While the Court has indicated a willingness to consider the need for modification of the Decree to give effect to the original apportionment, it has not opened the case to an unlimited reconsideration of the apportionment or to a complete reweighing of the equities on which the apportionment was based.

Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 4 (Docket No. 624).

The recommendations in the Third Interim Report suggest that the Special Master has not yet drawn a clear line defining the scope of this case. On the one hand he recommends dismissing with prejudice part of Wyoming's counterclaim because, in his view, Wyoming's request for additional injunctive relief would constitute a relitigation of the basic apportionment. Third Interim Report at 55.⁸ On the other hand, the Special Master recommends that the Court accept Nebraska's Counts I and III in their entirety, which would go well beyond the existing claims for modification of the Decree to carry out the apportionment and would transform this case into a complicated, time-consuming and expensive trial for a new and expanded apportionment.

The eight-year procedural history of this case undeniably establishes the need for a more complete defini-

8. Wyoming excepts to that recommendation and shows in the argument that follows (Part B) that Wyoming's claims for injunctive relief are in fact necessary to define and give effect to the geographic limits of Nebraska's apportionment, not to relitigate that apportionment.

tion of the existing apportionment. The claims and counterclaims which the Court has allowed to be filed present issues of whether new development in Wyoming on the one hand and wasteful practices in Nebraska on the other have injured or undermined the apportionment. The states need an answer to their competing claims that the other state has violated or circumvented the existing apportionment.⁹

The need to better define Nebraska's apportionment flows from the very nature of Nebraska's existing claims. Nebraska has repeatedly and consistently characterized the claims in its 1986 petition as seeking to protect the apportionment determined by the Court in 1945. To sustain its claim for new injunctive relief, Nebraska must show the injury to its apportionment and, therefore, must first define that apportionment.¹⁰ If the apportionment is defined no more specifically than 75% of the nat-

9. Wyoming has characterized its first counterclaim as seeking a clearer definition of Nebraska's apportionment in order to afford more certainty. This lawsuit epitomizes the uncertainty that Wyoming faces with each new proposal by one of its citizens to use water from the North Platte. Without a clearer definition of Nebraska's apportionment, Wyoming will continue to face the threat of litigation in the Supreme Court over each such proposal.

10. In his Fourteenth Memorandum, the Special Master raised the question:

If the court declines to define Nebraska's apportionment, what difficulties does that impose in determining whether proposed projects in Wyoming would cause injury to Nebraska's apportionment?

Fourteenth Memorandum of Special Master at 5 (Docket No. 677) (copy reproduced in Appendix at A-1). The answer to the Master's question is self-evident. Injury to something cannot be proved without first defining that which is alleged to be injured.

ural flow in the Guernsey Dam to Tri-State Dam section, then Nebraska's proof necessarily will fail. There is not even an allegation that Nebraska has ever failed to receive 75% of the natural flow present in the pivotal reach. Rather, Nebraska's allegation is that Wyoming threatens to deplete the natural flows reaching the apportioned section to the injury of uses dependent on those flows. In order to meet its burden of proving injury, Nebraska itself must define the reasonable requirements of those uses served by the apportionment or rely on the Court's previous determination of such requirements.¹¹

11. In the earlier proceeding Nebraska faced the same problem of showing injury and it attempted to do so through its "out-of-priority" studies, which were designed to show that senior Nebraska canals had received lessened supplies because of diversions by upstream junior canals in Wyoming. Special Master Doherty directed Nebraska to redo its out-of-priority studies holding the requirements of the Nebraska canals to those determined on the evidence before Special Master Doherty. Doherty Report at 103. In other words, Special Master Doherty realized that injury could be shown only if there were some reasonable requirement against which to measure the alleged injury. Likewise today, even if the requirements previously determined by Special Master Doherty and the Court are not to be taken as absolute diversion limits, there must be some measureable definition of the Nebraska requirements in order to determine the question of injury.

B. THE SPECIAL MASTER'S RECOMMENDATION TO DENY WITH PREJUDICE PART OF WYOMING'S FIRST COUNTERCLAIM AND FIRST CROSS-CLAIM WOULD PREMATURELY LIMIT THE CHOICE OF REMEDIES AVAILABLE TO THE COURT UPON PROOF THAT NEBRASKA AND THE UNITED STATES HAVE CIRCUMVENTED THE APPORTIONMENT.

The Special Master recommends that the Court consider Nebraska's claims for additional injunctive relief by way of modification of the Decree but deny with prejudice Wyoming's similar claims for new restrictions on Nebraska to prevent waste and unlawful use that injures Wyoming users. There is no basis for the distinction drawn by the Special Master between Nebraska's and Wyoming's tendered claims for injunctive relief.

1. The Need for Additional Injunctive Relief Sought in Wyoming's First Counterclaim and First Cross-Claim was Contemplated in the Court's 1945 and 1993 Opinions.

In the proceedings leading to the 1945 Decree, the United States asked the Court to include specific injunctions in the Decree limiting Nebraska's share of water in the pivotal reach at any time to the amount of water actually being diverted by the Nebraska canals in that reach up to the requirements of the lands under those canals. *Nebraska v. Wyoming*, 325 U.S. at 628. The United States was concerned that Nebraska, through administration of water rights within Nebraska, would draw natural flow from Wyoming for uses downstream

of Tri-State Dam. While the Court agreed that Nebraska's equitable apportionment did not extend to uses below Tri-State Dam, it did not see a need at the time for the injunctions requested by the United States. Instead, the Court left the issue open for further consideration:

We cannot assume that Nebraska will undertake to circumvent the decree. . . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-29.

With its original counterclaim and now with its First Counterclaim and First Cross-Claim, Wyoming seeks such relief at the foot of the Decree. Wyoming asks first for the Court to define Nebraska's apportionment. Then if Wyoming proves, as it has alleged, that unlawful and wasteful practices by canals in the pivotal reach undermine or circumvent that apportionment, Wyoming would ask the Court to consider modifying the Decree to include additional injunctive relief.¹² The Court in its

12. When the Nebraska canals in the pivotal reach divert more water than they need, more junior canals make up their deficiency by increasing their demand for storage water. See *Nebraska v. Wyoming*, 325 U.S. at 630-31. The resulting depletion of storage supplies then has further injurious effect because the storage reservoirs must replace that supply by exercising their priority for storage of water before junior Wyoming water rights. On the average natural flow meets only about 50% of the requirements of the canals in the pivotal reach. Third Interim Report at 62; *Nebraska v. Wyoming*, 325 U.S. at 605. The balance of supply is from stor-

1993 opinion acknowledged that Special Master Doherty calculated the requirements of Nebraska's canals in the Guernsey to Tri-State section "for the purpose of determining the appropriate apportionment in the pivotal reach, not to impose a cap on the canals' total diversions . . ." *Nebraska v. Wyoming*, 113 S.Ct. at 1701. Consequently, the Court granted Nebraska's request for partial summary judgment that the Decree does not "impose absolute ceilings on canals taking in the pivotal reach." However, the Court also held that this case should not be narrowly confined to claims to enforce the terms of the existing Decree, but would include claims to modify the Decree pursuant to Paragraph XIII of the Decree.

The 1945 Decree apportions to Nebraska 75% of the natural flow in the Whalen to Tri-State reach of the North Platte. To ensure that an equitable supply of water arrives in that reach for division between the two states, the Decree places a variety of injunctions on Wyoming and Colorado activities upstream. As the Special Master noted in oral argument, this case is "well beyond" argument over strict application of those injunctions. Transcript of July 26, 1994 hearing at 172-73 (Docket No. 688). The Nebraska case before the court is

age water controlled by the United States under contracts with the various irrigation districts. Wyoming's First Cross-Claim against the United States recognizes that the United States shares responsibility for the wasteful diversions occurring in both the federal project canals and those receiving storage water under the Warren Act, 43 U.S.C. §§523-25 (1988). Wyoming's Fourth Cross-Claim further alleges that the United States has upset the apportionment by failing to abide by the relevant contracts and federal law in the distribution of storage water. The Special Master has recommended that the Court accept the filing of Wyoming's Fourth Cross-Claim.

based entirely on the need for *additional* injunctions regarding development of North Platte tributaries, i.e. additional definition of the equitable apportionment Nebraska claims under the 1945 Decree.

The relief sought in Wyoming's First Counterclaim and First Cross-Claim parallels that sought by Nebraska respecting water development on the tributaries in Wyoming. For example, although the Court in 1945 declined to limit Wyoming's development of the tributaries between Pathfinder and Guernsey, Nebraska now has an opportunity to seek modification of the Decree under the Court's express retained jurisdiction. *Nebraska v. Wyoming*, 113 S.Ct. at 1699; Decree Paragraph XIII(c). The Court also has given Nebraska an opportunity, under the general retained jurisdiction provisions of Paragraph XIII(f) of the Decree, to seek modification of the Decree to restrict Wyoming's use of the Laramie River despite the exclusion of the Laramie from the 1945 apportionment. 113 S.Ct. at 1695, 1697-98.

Like Nebraska's claims, Wyoming's First Counterclaim and First Cross-Claim would seek modification of the Decree pursuant to the Court's express anticipation of the need for such relief. However, the Special Master recommends that Wyoming's claim for modification of the Decree be denied with prejudice because in his view it seeks to relitigate matters that were decided by the Court in 1945. If the Special Master were to apply the same analysis to Nebraska's claims, he would have to conclude that Nebraska is seeking to relitigate the Court's previous decision not to restrict Wyoming's use of the Laramie and not to impose limits on development of the tributaries like Deer Creek. The Special Master

seems to apply different standards to Wyoming's and Nebraska's claims for modification of the Decree when there is no justification for distinguishing the two. Both seek additional injunctive relief to protect the equitable apportionment by addressing matters over which the Court retained jurisdiction.

2. The Court did not Sanction Waste by Allowing Nebraska to Allocate its Percentage Share Among its Canals in the Pivotal Reach.

The Special Master apparently felt constrained by the 1945 and 1993 opinions of the Court to deny Wyoming an opportunity for affirmative relief to address the issue of waste. The Special Master's recommendation rests on two erroneous assumptions:

1. That Nebraska has an absolute and immutable right to allocate its share of natural flow in the pivotal reach among its canals without regard to waste or the injurious effect of such waste on the equitable apportionment; and
2. That beneficial use of water is a concept foreign to the equitable apportionment.

The Special Master suggests that Wyoming's request for affirmative relief would constitute a request to relitigate the basic apportionment. Third Interim Report at 63 n.156. However, the Special Master's analysis does not recognize the distinction between the basic equitable apportionment and the injunctions in the Decree which were fashioned for the purpose of carrying that apportionment into effect. The Court held in its 1993 opinion that, under the present Decree, Nebraska may distrib-

ute its 75% of the natural flow in the pivotal reach in any way it sees fit. *Nebraska v. Wyoming*, 113 S.Ct. at 1701. But the Court was interpreting the existing Decree and addressing Wyoming's claim that Nebraska's waste violated injunctions in the Decree. The 1993 opinion did not foreclose the opportunity of Wyoming to seek modification of the Decree if Wyoming proved that Nebraska's method of allocating water among its users upsets the very basis of the apportionment. Rather than allow exploration of alternative approaches to providing a more administrable definition of Nebraska's apportionment, the Special Master has wrongly interpreted the 1993 opinion as a rejection of any effort to more completely define the apportionment. Such a conclusion is plainly contrary to the Court's 1945 opinion acknowledging that a remedy for such circumvention of the apportionment should be available at the foot of the Decree.

Far from constituting a concept foreign to the doctrine of equitable apportionment, the doctrine of beneficial use lies at the very heart of both state and federal water allocation laws and is an essential predicate of the equitable apportionment effected by the 1945 Decree. Under the laws of both Nebraska and Wyoming, as well as under federal reclamation law, beneficial use constitutes the measure and the limit of a water right. Wyo. Stat. §41-3-101 (1977); Neb. Rev. Stat. §46-231 (1988 Reissue); Reclamation Act of 1902, §8, 43 U.S.C. §372 (1988). A water right is limited to the amount that can be beneficially used regardless of the amount of the "paper water right" fixed by permit. See *Central Platte Natural Resource District v. State of Wyoming, et al.*, 245 Neb. 439, 513 N.W.2d 847 (1994); *Budd v. Bishop*, 543 P.2d 368, 373 (Wyo. 1975).

Both Special Master Doherty and the Court were well aware of the limits of beneficial use in fashioning the 1945 apportionment. Doherty Report at 15; *Nebraska v. Wyoming*, 325 U.S. at 612-614. It is inconceivable that the Court in 1945 would have ignored a water law principle as fundamental as that of beneficial use in formulating the apportionment. Rather, the Court assumed as an essential underpinning of the apportionment that each state and the federal agencies responsible for administration of water rights under the Decree would continue to be guided by the doctrine of beneficial use and would not allow canals to divert substantially more than their requirements.¹³

The Special Master finds "no criteria for nor definitions of waste or beneficial use in either [Special Master Doherty's] Report or the decree." Third Interim Report at 60-61 n.151. He points out that Special Master Doherty devoted "considerable energy to addressing historic diversions." *Id.* Wyoming acknowledges that

13. For example, in the earlier proceeding Nebraska argued that Special Master Doherty had allowed an insufficient diversion requirement for the Northport Canal. The issue was whether the Northport Canal could demand a full supply at the river headgate when much of its requirement was met by return flows accruing directly to the canal. The Court said,

We conclude that Northport should be entitled to use that amount of flow during the season to meet its requirement of 19,100 acre-feet. The 186 second feet will, however, be subject to reduction by the amount of return flow intercepted by . . . Northport at any given time.

325 U.S. at 651 (emphasis added).

The Court obviously thought there would be some limits on the canals' diversions, even if the Court would decline at that time to impose limits through specific injunctions in the Decree.

Special Master Doherty considered historic diversions in determining the requirements of the canals in the pivotal reach. However, historic diversion was only one of many factors considered by Special Master Doherty. He painstakingly determined the amounts of irrigated acreage under each canal, the rates of seepage and loss for each canal and, ultimately, the amount of water per irrigated acre that was reasonably required to achieve the successful irrigation of the particular lands. Doherty Report at 196-245. In fact, Special Master Doherty expressly rejected historic diversions as a reliable measure of requirements:

The exceedingly wide fluctuation in the delivery of water to this [Northport] project (as well as to a great many others) seriously discredits those deliveries as a measure of requirement. This is true whether we look at the maximum or minimum or to an average. A more reliable method, wherever the record supplies the necessary data, is to start with the per acre requirement at the land, ascertain and apply the canal loss percentage, and thus arrive at the necessary rate of headgate diversion.

Doherty Report at 223.

Regardless of the methodology used and the factors considered by Special Master Doherty, the fact is that he determined the irrigation requirements of those specific lands and the Court adopted his findings "for the purpose of determining the appropriate apportionment in the pivotal reach." 113 S.Ct. at 1701.¹⁴ If Wyoming

14. Special Master Doherty defined "irrigation requirement" as "the quantity of water, inclusive of precipitation, (including *unavoidable* wastes) that is required for crop production." Doherty Report

proves that Nebraska users, with the aid or acquiescence of the United States, have circumvented the apportionment by diverting in excess of the requirements of the lands supplied by canals in the apportioned reach and by spilling or returning that excess water to the river for uses not recognized in the Decree, the Court should have power to fashion an appropriate remedy.

3. *The Principle Favoring Deference to Intrastate Administration of Water Rights Does not Compel the Dismissal of Wyoming's Claims for Additional Injunctive Relief.*

The Special Master's fear that the relief sought in Wyoming's First Amended Counterclaim would unduly interfere with intrastate water administration is misplaced. Third Interim Report at 62. While the Court tries to defer to intrastate administration where possible, an interstate equitable apportionment can and does determine and limit individual water uses when such a limit is necessary to effect the equitable apportionment. See, *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Here the Court has already determined that the equitable apportionment does not entitle Nebraska to demand direct flow from Wyoming for uses below Tri-State. *Nebraska v. Wyoming*, 325 U.S. at 628. If Wyoming proves that Nebraska is accomplishing indirectly, through waste and inefficiency, that which the Court said it could not do directly, the Court has said that it will consider the need for additional injunctive relief. *Id.* at 628-29.

at 5 (emphasis added). Wyoming uses the term "beneficial use requirement" synonymously. Reasonably avoidable waste is not part of requirements, even under Special Master Doherty's definition.

4. *The Effect of Adopting the Special Master's Recommendation Would be to Render the Court Powerless to Fashion Affirmative Relief to Control Nebraska's Waste.*

The Special Master has acknowledged that evidence of Nebraska's waste and inefficiency will be part of Wyoming's defense to Nebraska's various claims. Third Interim Report at 63-64 and n.158. Thus, denying Wyoming's First Counterclaim and First Cross-Claim with prejudice as recommended by the Special Master would not limit the evidence or scope of trial but would only limit the scope of relief that could be considered or adopted by the Court.

The better approach would be to withhold ruling on the appropriate scope of relief until the facts have been developed. In his recommendation concerning Wyoming's Third Counterclaim dealing with transportation losses, the Special Master adopts such an approach by recommending that the Court "not foreordain the relief to be granted." Third Interim Report at 66. Likewise, there is no reason at this stage to prematurely and prospectively limit the remedies that the Court might adopt if Wyoming proves that the operation of the Nebraska canals in the pivotal reach is fundamentally undermining the equitable apportionment.

C. BY ANNOUNCING THAT HE WILL HEAR EVIDENCE OF INJURY TO USES BELOW TRI-STATE DAM AS PART OF NEBRASKA'S COUNTS I AND III, THE SPECIAL MASTER WOULD TRANSFORM THIS CASE INTO ONE FOR A NEW APPORTIONMENT.

1. *The Special Master's Recommendation that the Court Consider Alleged Water Needs for Endangered Species, Wildlife Habitat and Other Uses Downstream of the Apportioned North Platte River Contradicts the Court's Denial of Nebraska's Earlier Motions to Amend.*

The Court twice has denied Nebraska leave to amend its petition: once to seek a new apportionment for endangered species and wildlife habitat in the Platte River in central Nebraska, *Nebraska v. Wyoming*, 485 U.S. 931 (1988), and once to seek an apportionment of non-irrigation season flows primarily for uses downstream of the presently apportioned reach. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). Nebraska has again requested leave to amend its petition to seek an apportionment of non-irrigation season flows in large part for alleged endangered species and wildlife habitat uses in the central Platte River downstream of the apportioned North Platte River. Nothing has changed to warrant a different result and therefore, the Special Master again recommends that the Court deny leave to bring such claims. However, he then effectively negates that recommendation by stating that the downstream endangered species and wildlife issues are already in the case as part of Nebraska's Laramie River and Deer Creek claims. See Third Interim Report at 14 ("[S]ome evi-

dence of those changes [that affect wildlife uses in downstream Nebraska] and their impact on the critical habitat will be introduced."), 17 ("Because several key federal environmental laws had not been enacted at the time of the original proceedings, those statutes and the wildlife uses they recognize may also come before the Court now as changed conditions."), 26 ("Despite the Court's denial of Nebraska's 1988 petition, wildlife habitat problems continue to present issues that ultimately cannot be ignored in these proceedings.").

The Special Master intends to entertain claims by Nebraska to impose new restrictions on Wyoming for the purpose of supplying water for endangered species and wildlife habitat purposes in the central Platte:

Nebraska invoked wildlife needs in central Nebraska in both her 1988 and 1991 proposed amendments. Although her motions were denied, Nebraska has persisted in her attempts to have wildlife issues considered in this proceeding in order to protect that equity and to spread the burden of providing water for wildlife habitat.

* * *

While I continue to believe that the time has not yet come for a global non-irrigation season apportionment for wildlife habitat and other uses, I do not doubt that wildlife issues must be considered in, and evidence of the needs of these uses admitted into, this case in the context of the controversies over the waters of the Laramie River and Deer Creek.

Third Interim Report at 18-20.

The Special Master acknowledges that "apportioning the non-irrigation season flows will be an entirely new and extremely complex original jurisdiction case" and that "[t]o add Count IV would surely bring about further delay and complexity." Third Interim Report at 54, 55. On the other hand, he suggests that an inquiry into wildlife uses in the context of Nebraska's Deer Creek and Laramie River claims would be more limited in scope than the "global apportionment" sought in Nebraska's tendered Count IV and that "apparently much of the data evidencing necessary flows for wildlife has already been developed." *Id.* at 53 n.137.

There cannot be a *limited* inquiry into the endangered species and wildlife habitat issues that would apply only to requests for new injunctions against Wyoming. If the Court takes on the issue, a trial would be required to determine initially whether and if so, what amount of, flows are essential to the conservation and recovery of the endangered species and their critical habitat. In that type of cart-before-the-horse approach to equitable apportionment, the Court would then need to assess whether its initial determination could lead to the type of real and substantial injury upon which Nebraska could rely to have the Court reconsider the equitable apportionment of the North Platte. Only after all of that initial effort to establish the ripeness of Nebraska's claims, would the weighing of downstream uses against Wyoming uses be appropriate. Then, rather than the one-sided trial now perceived by the Special Master, any such trial to reweigh equities would also include evidence of Nebraska's own responsibility for depletion of the central Platte River, including evidence of Nebraska's extensive ground water use, expanded irrigation use, etc. *See Wyoming Response to*

Nebraska's Motion for Leave to Amend at 37-43 (Docket No. 664).

To allow Nebraska in the context of its Laramie River and Deer Creek claims to seek restrictions against Wyoming in order to secure a supply of year-round flows for endangered species and wildlife habitat purposes would in fact be to entertain a claim for an apportionment for such wildlife uses. Such a result would plainly contradict the Court's denial of Nebraska's two previous motions to amend.¹⁵ Wyoming acknowledges that the Court in its 1993 opinion declined "to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings." *Nebraska v. Wyoming*, 113 S.Ct. at 1695. There is no indication, however, that the Court intended by that language to reverse its previous denial of Nebraska's claim for an apportionment for endangered species and wildlife habitat uses in the central Platte River. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). In fact, by subsequently denying Nebraska leave to file Count I of its 1991 amended petition, the Court reaffirmed that this case was not to include a claim for apportionment of non-irrigation season flows or for uses below Tri-State Dam such as endangered species and wildlife habitat purposes. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993).

15. At the hearing before the Special Master on June 26, 1994, counsel for Nebraska admitted that Nebraska's Count IV would have been unnecessary had Nebraska known that the Special Master would treat Nebraska's existing Laramie River and Deer Creek claims as encompassing the non-irrigation season and endangered species issues. Transcript of June 26, 1994 Hearing at 157-59.

2. *Allegations of Injury to Endangered Species and Wildlife Habitat are Based on Mere Speculation That Various Pending Proceedings Under State or Federal Environmental Laws Will Quantify a Water Requirement for Such Uses and That Quantification Will Lead to Claims of Real Injury.*

The Court's denial of Nebraska's previous amendments evidenced not only a reluctance to expand this case into one for a new apportionment but also a recognition that endangered species issues must be addressed in the first instance under the statutes enacted by Congress for that purpose. Nebraska's allegation that Deer Creek Reservoir or development on the Laramie will harm flows needed for wildlife habitat, like Nebraska's claim for a "global apportionment" for wildlife uses, is based on the anticipation that certain federal environmental laws might impose an unfair and disproportionate burden on Nebraska users to provide water for wildlife habitat. Third Interim Report at 18.

The Federal Energy Regulatory Commission is considering renewal of hydroelectric licenses for Kingsley Dam and related facilities in Nebraska. The central issue there is whether and the extent to which releases may be required from the two million acre-foot Lake McConaughy to avoid jeopardy to endangered species or their habitat. However, Nebraska is not alone in facing the endangered species problem. All three states in the Platte River drainage are involved in negotiations to develop a basin wide recovery program for the Platte River endangered species.¹⁶ The U.S. Bureau of

16. The Recovery Plan process is a cooperative effort among the three states, the United States and environmental and water user representatives to find a way to recover Platte River endangered

Reclamation and the U.S. Fish and Wildlife Service are studying the environmental effects of operation of the federal reservoirs in Wyoming and Colorado. Affidavit of John H. Lawson, United States Response to the Intervention Motions of the Platte River Trust, et al. (Docket No. 398). Deer Creek Reservoir underwent formal consultation under Section 7 of the Endangered Species Act (16 U.S.C. §1536(1988)) to assure non-jeopardy to the endangered species. Virtually any significant water development project in any of the three states will have federal involvement triggering similar review under federal environmental laws.

However, until the various proceedings applying the federal environmental laws to Nebraska's water uses have run their course and specific water requirements for wildlife have been determined, it is premature to speculate on the outcome of such proceedings or to consider reopening the apportionment on the mere antici-

species without upsetting existing equitable apportionments. (The South Platte River is apportioned by interstate compact between Colorado and Nebraska. South Platte Compact, 44 Stat. 195.) See Transcript of July 26, 1994 hearing at 86-91 (Docket No. 688); Third Interim Report at 26-28 n.72. Wyoming believes that the Court should encourage such an effort to resolve the endangered species concerns within the existing apportionment. However, the Special Master, based on extraneous materials provided by various amici, dismisses the Recovery Plan effort because the Governor of Colorado reportedly expressed the view that the interstate agreement to initiate the process had not committed Colorado "to deliver any more water at the Colorado-Nebraska state line than is provided by interstate compact." Third Interim Report at 27 n.72; July 26, 1994 Transcript at 87-89. Before any evidence has been offered, confronted or admitted, and before the Court has accepted jurisdiction over the issue, the Special Master has improperly relied on "substantial factual information and learning" outside the pleadings, affidavits and sworn discovery responses in the record to presume a water requirement for endangered species. Third Interim Report at 20.

pation of a particular result. The Court will not exercise its original jurisdiction over a claim involving future, speculative injury. See *New York v. Illinois*, 274 U.S. 488, 490 (1927); *Arizona v. California*, 283 U.S. 423, 462 (1931); *United States v. West Virginia*, 295 U.S. 463, 475 (1935).

The Special Master appears to have assumed that, as a matter of fact, there is a shortage of needed water for wildlife habitat and that he will merely weigh that predetermined equity when considering whether to recommend modification of the Decree. See Third Interim Report at 11-20, 53 n.137. Such allegations cannot be assumed. They are being disputed and intensively negotiated in the proceedings before the Federal Energy Regulatory Commission on Relicensing of Kingsley Dam, in the environmental review of North and South Platte federal reservoirs, and in the Recovery Plan negotiations. The wildlife issues belong in those forums and there is no reason to presume at this stage that their resolution will require the Court's involvement or a reopening of the equitable apportionment.

D. THE COURT SHOULD NOT ACCEPT NEBRASKA'S HORSE CREEK CLAIMS WHICH WOULD SEEK TO EXPAND THE GEOGRAPHIC SCOPE OF THE APPORTIONMENT WITHOUT ALLEGING SUFFICIENT INJURY TO WARRANT REOPENING THE APPORTIONMENT.

Wyoming and the United States opposed the part of Nebraska's Count I that would seek injunctive relief to prevent contemplated irrigation efficiency measures

under a federal irrigation project in the drainage of Horse Creek, a tributary entering the North Platte below Tri-State Dam. On its face the issue appears to involve the existing apportionment. However, Nebraska's Horse Creek claim actually seeks to protect a certain flow regime below Tri-State Dam that would require expanding the apportionment. The Special Master recognizes that Nebraska's Horse Creek claim involves a request to reopen the apportionment to extend its geographic limits. Third Interim Report at 41-43. But he fails to recognize that Nebraska must overcome the Court's reluctance to reopen an equitable apportionment. *Nebraska v. Wyoming*, 113 S.Ct. at 1696. Even assuming Wyoming's actions would affect return flows below Tri-State Dam, that fact alone is not sufficient to warrant the Court extending the apportionment below Tri-State Dam. The Court should not presume injury.

The Special Master suggests that Horse Creek constitutes a unique situation where such return flows accrue within Wyoming's borders and conceivably could be captured by a Wyoming user. However, the amount of water involved is too small and the likelihood of any substantial development too remote to justify the extraordinary step of reopening the basic apportionment to extend its geographic limits.¹⁷ Moreover, the Court can take notice that it is virtually impossible for Wyoming or

17 The specific improvement in question on Horse Creek is a 680 acre-foot re-regulating reservoir proposed to increase the efficiency of the Ft. Laramie Canal which delivers water to the Goshen Irrigation District in Wyoming and the Gering-Ft. Laramie Irrigation District in Nebraska. The reservoir would periodically impound flows from the canal for later delivery to North Platte Project lands, thereby providing a small reduction in the diversion demand on the North Platte River. By way of comparison, the

its water users to have any substantial impact on return flows and local sources below Tri-State Dam. Water uses that can affect the return flows below Tri-State are almost entirely in Nebraska's control.

Finally, even if Nebraska could show an imminent and substantial threat to uses dependent on return flows, Nebraska's theory faces the legal obstacle that Nebraska's own law recognizes the right of an irrigator to recapture and use return flows within its control. *United States v. Tilley*, 124 F.2d 850, 858 (8th Cir. 1942); *Ramshorn Ditch Company v. United States*, 269 F. 80 (8th Cir. 1920). The same principle was applied by the Court in 1945 when it acknowledged the right of the United States and irrigators under the federal projects to reuse return flows which were captured and controlled within the federal project. *Nebraska v. Wyoming*, 325 U.S. at 634-37. Nebraska cannot in equity argue that a different standard ought to apply as an interstate matter. *Kansas v. Colorado*, 206 U.S. 46 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906).

annual gains to the North Platte between Tri-State Dam and Bridgeport, Nebraska have averaged 736,000 acre-feet. Affidavit of Ann S. Bleed, March 1, 1991, Nebraska's Motion for Partial Summary Judgment at 27, 35 (Table 5) (Docket No. 296). Moreover, this project has been placed in "inactive" status by the Wyoming Water Development Commission. Fourth Affidavit of Michael K. Purcell, ¶ 15, Wyoming Response to Nebraska's Motion for Leave to File Amended Petition (Docket No. 651).

**E. NEBRASKA IN EQUITY CANNOT DEMAND
INJUNCTIONS AGAINST WYOMING
GROUND WATER USE AS A MATTER OF
INTERSTATE EQUITABLE APPORTION-
MENT WHEN NEBRASKA'S OWN LAW
DOES NOT RECOGNIZE SUCH A REMEDY
INTRASTATE.**

Nebraska claims in Count I that Wyoming violates the apportionment "by the present and future effects of existing ground water development and by potential ground water development for municipal, industrial, and irrigation purposes. . ." Nebraska Amended Petition at 4-5. In addition, Nebraska claims in Count III that Wyoming depletes Laramie River flows guaranteed by the Grayrocks settlement agreement "by the present and future effects of existing and threatened ground water development" ¹⁸ Nebraska Amended Petition at 9. On the other hand, Nebraska law does not allow for restriction of ground water use regardless of the impact such use might have on surface water supplies. Therefore, Wyoming objects to Nebraska's ground water claims and asks that they be dismissed from Counts I and III for failure to state a claim upon which relief can be granted in equity. Wyoming's objection is equivalent to a motion to dismiss under Fed.R.Civ.P. 12(b)(6) or 12(c). Robert L. Stern, Eugene Gressman, et al., *Supreme Court Practice* at 478 (7th Ed. 1993). Wyoming hopes to avoid a costly and time-consuming trial if the

¹⁸ Although Nebraska's claims to Laramie River flow assume that the Grayrocks settlement should form the basis of an injunction against Wyoming, the Court has specifically declined to rely on that private agreement to reduce Nebraska's burden of proof on the Laramie claims. *Nebraska v. Wyoming*, 113 S.Ct. at 1699; see also *Mississippi v. Louisiana*, 113 S.Ct. 549 (1992).

Court will not as a matter of equity grant the relief Nebraska seeks.¹⁹

There is a fundamental distinction between Nebraska's ground water claims and the other claims that the Court has already accepted. By refusing to provide for the regulation of wells to protect senior surface water rights under its own state law, Nebraska effectively fails to recognize the connection between ground water and surface water. Thus, a simple principle of equity will control the issue. The Court in equity should not entertain a claim by one state against another for relief that the complaining state's own law fails to recognize intrastate. *Missouri v. Illinois*, 200 U.S. 496 (1906). A similar principle was applied in *Kansas v. Colorado*, 206 U.S. 46, 104-05 (1907) (Since Kansas law required appropriators to honor the reasonable use of a riparian proprietor "she cannot complain if the same rule is administered between herself and a sister state.")).

Nebraska's position is like that of Missouri in *Missouri v. Illinois*, *supra*. There the Court declined to enjoin the dumping of sewage in the Illinois River by Illinois municipalities in part because Missouri, the complaining state, had no way to control similar discharges by its own municipalities:

Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a

19 Wyoming, of course, disputes Nebraska's estimates of the quantity of ground water depletions but acknowledges that at this stage of the pleadings the Court should take the allegations of the pleadings as true. *Ohio v. Kentucky*, 410 U.S. 641, 645 (1973).

standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame.

Id. at 522.

Perhaps *Missouri v. Illinois* is distinguishable by the fact that it was decided after trial. However, Wyoming believes that Nebraska's failure to address ground water regulation as an intrastate matter "offers a standard to which the defendant [Wyoming] has the right to appeal" in this case and will ultimately provide a basis for denial of the relief Nebraska seeks. If the Court agrees, then there is no need for a trial. Rather, the Court should deny the claim at this stage in keeping with the Court's desire to dispose of claims at the earliest possible stage. See *Ohio v. Kentucky*, 410 U.S. 641 (1973).

The Special Master rejects Wyoming's position as contrary to "the clear modern trend in water law to take account of the connection between ground waters and surface waters." Third Interim Report at 39. However, Wyoming freely acknowledges the ground water/surface water connection. Wyoming law has endorsed the "modern trend in water law" and provides a remedy to surface water users whose rights are injured by ground water depletion. See Wyoming Memorandum Describing the Administration of Water Rights in the North Platte Basin (September 17, 1993) at 57-60 (Docket No. 565); Wyo. Stat. §§41-3-901 to 938 (1977). Only Nebraska law, on the other hand, adheres to the admittedly outdated

view that neither recognizes the ground water/surface water connection nor provides for regulation of wells. *Natural Resources, Energy, and Environmental Law, 1993 The Year in Review*, Section of Natural Resources, Energy, and Environmental Law, American Bar Association (1993) at 329-30; *Central Platte Natural Resources District v. Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994); Nebraska's Answers to Wyoming's Third Set of Requests for Admissions at 4-5, Admission No. 5 (Docket No. 186). The issue is not one of fact, but turns on the basic equitable principle that Wyoming should not be subject to interstate restrictions that Nebraska will not impose as a matter of intrastate law.

The Special Master dismisses Wyoming's equitable argument with the following statement:

Nebraska provides a sufficient answer to Wyoming's equitable argument by noting that Wyoming "forgets that it is the upstream state which is subject to decreed restrictions designated to protect the natural flows of the North Platte River in the reach above the state line."

Third Interim Report at 40. The argument that only Wyoming wells and not Nebraska wells affect the flow to the pivotal reach, even if accepted as true, does not respond to the holding in *Missouri v. Illinois* that a state's intrastate laws and administrative practice should be taken to provide an equitable "standard to which the defendant state has the right to appeal in an interstate dispute." 200 U.S. at 522.

If the Court allows Nebraska to proceed to trial on its ground water claims, then those claims should be limit-

ed to the protection of flows to meet the requirements of canals in the pivotal reach above Tri-State Dam rather than to the protection of flows for uses downstream of Tri-State Dam. Moreover, if Nebraska attempts to limit ground water use in Wyoming, Wyoming must be allowed to demonstrate the self-inflicted injury that results from Nebraska's refusal to regulate ground water use intrastate.²⁰

VI. CONCLUSION

For the foregoing reasons, the Court should adopt the Special Master's recommendations with the following exceptions:

1. The Court should grant Wyoming leave to file its First Counterclaim and First Cross-Claim in their entirety;

2. The Court should clarify that Nebraska's claims are limited to those brought for the purpose of carrying into effect the existing apportionment for the irrigation of lands served by diversions in the pivotal reach;

3. The Court should deny Nebraska leave to file that part of its Counts I and III involving ground water uses in Wyoming.

²⁰ Wyoming disputes the assumption that Nebraska wells cannot affect the supply of water to lands irrigated from the pivotal reach. Nebraska wells can substantially affect the supply available to lands under the canals diverting from the pivotal reach, thereby increasing the demand by those canals on natural flow and storage water from Wyoming. Fourth Affidavit of Bern S. Hinckley, Wyoming Response to the Supplemental Memorandum for the United States (Docket No. 682).

Respectfully submitted,
JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

A handwritten signature in black ink, appearing to read "Dennis C. Cook", written over a horizontal line.

DENNIS C. COOK
Special Assistant Attorney General
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320
RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782
ATTORNEYS FOR THE
STATE OF WYOMING





No. 108, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING, ET AL.,
Defendants.

OFFICE OF THE SPECIAL MASTER

**FOURTEENTH MEMORANDUM
OF SPECIAL MASTER**

**PRE-HEARING MEMORANDUM
ON MOTIONS TO AMEND THE PLEADINGS**

A hearing has been scheduled on July 26 and 27, 1994 to address Nebraska's¹ and Wyoming's² motions to amend the pleadings. The purpose of this memorandum

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- 1 Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River Below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River, and Brief in Support of Motion For Leave to File Amended Petition ("Nebraska's Motion"), Feb. 18, 1994.
 - 2 Wyoming Motion For Leave To File Amended Counterclaims and Cross-Claims, Amended Counterclaims and CrossClaims, And Brief In Support Of Motion For Leave To File Amended Counterclaims and Cross-Claims ("Wyoming's Motion"), Feb. 18, 1994.

is to assist the focus of that hearing. Where they are formed, I set forth below my *tentative* recommendations to the Supreme Court respecting the disposition of the various counts in Nebraska's and Wyoming's motions. I have posed some questions, but the discussion at the hearing should not be limited by those questions.

Several of the proposed new pleadings are complex in form. At the conclusion of the hearing, during our status conference, I would find it useful to work together to simplify complex elements of the proposed new pleadings.

I propose to recommend that the Supreme Court grant the states' motions to amend the pleadings where they are uncontested and where the Supreme Court's standards for exercising original jurisdiction are met. Uncontested counts of the motions to amend include:

Nebraska's Count II
Wyoming's Second Counterclaim
Wyoming's Second Cross-Claim
Wyoming's Third Counterclaim
Wyoming's Third Cross-Claim

With respect to the remaining proposed claims, my tentative recommendations are as follows:

NEBRASKA'S COUNT I

GRANT, except with respect to the proposed amendments regarding existing and potential groundwater depletions. I am presently undecided on that issue pending receipt of the July 20, 1994 responses to the July 1, 1994 Supplemental Memorandum of the United

States on Proposed Amended Claims of Wyoming and Nebraska. I am also presently undecided concerning the inclusion of the Horse Creek issue.

Questions:

1. Where, oh where, is Horse Creek?
2. What was the status of Horse Creek in the original proceedings?

NEBRASKA'S COUNT III

GRANT.

NEBRASKA'S COUNT IV

DENY WITHOUT PREJUDICE on ripeness grounds the proposal for a global non-irrigation season apportionment, but address effects on non-irrigation season flows of all proposed projects or issues currently in the case and added to the case by amended pleadings.

Questions:

1. Are there imminent and substantial threats of additional non-irrigation season depletions in Wyoming that will not be addressed through claims already in the case? If so, what actions or proposed actions of Wyoming give rise to those threats, and what is the magnitude of their anticipated depletions? If there are in fact such imminent and substantial threatened depletions, could they be addressed on a case-by-case basis instead of by a global non-irrigation season apportionment?

2. Were there to be a present global apportionment of non-irrigation season flows among Colorado, Wyoming and Nebraska, how would the Court go about quantifying the flows Nebraska seeks for each of the equities she asserts — irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation and fish and wildlife? For example, how should the Court go about quantifying Nebraska's fish and wildlife equities? Would doing so require the Court to be informed of the ongoing habitat and recovery initiatives of responsible state and federal wildlife agencies and the flows that will ultimately be required to implement regulatory measures yet in the process of being formulated?
3. Were the Court to apportion non-irrigation flows for equities asserted by Nebraska, would the Court have to craft decree provisions to assure that those equities are actually served? Again using fish and wildlife equities as an example, would the Court be obliged to write the decree so as to assure that the fish and wildlife share would arrive where it is needed and would not be depleted by other Nebraska uses?
4. What is the status of recent work on the Central Platte River Recovery Implementation Program and by the Bureau of Reclamation? What, if any, agreements have been made among the states concerning contributions to be made to the program of river recovery?
5. Short of a global off-irrigation season appropriation, what could be achieved in the context of this

case to preserve flexibility to meet downstream wildlife equities as determined, for example, by ongoing studies of state and federal agencies. Cf. Second Interim Report on Motions For Summary Judgment and Reviewed [sic] Motions For Intervention (April 9, 1992) at 107 n.116.

WYOMING'S FIRST COUNTERCLAIM WYOMING'S FIRST CROSS-CLAIM

DENY, except GRANT the amendment for the final paragraph (“ . . . to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.”).

Questions:

1. What remains of Wyoming's original counterclaims following the Supreme Court's 1993 opinion?
2. If the Court were to venture to “define” Nebraska's apportionment as Wyoming requests, how would it go about that task? More specifically, how would that definition take account of the non-irrigation uses that are ultimately served by Nebraska's apportionment? For example, how would the Court accommodate fish and wildlife within such a definition?

3. If the Court declines to define Nebraska's apportionment, what difficulties does that impose in determining whether proposed projects in Wyoming would cause injury to Nebraska's apportionment?

**WYOMING'S FOURTH COUNTERCLAIM
WYOMING'S FIFTH CROSS-CLAIM**

GRANT.

Questions:

1. What is the current status of negotiations respecting a revision of the transportation loss formula?
2. Could I be of assistance in reaching a consensus on a revised transportation loss formula?

WYOMING'S FOURTH CROSS-CLAIM

GRANT.

Questions:

1. What is the current status of *Goshen Irrigation District v. United States*, No. C89-0161-J?

/s/ _____
Owen Olpin, Special Master

DATED: July 12, 1994

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